The CONTRACTING PARTIES reaffirmed their adherence to the basic GATT mechanism for the management of disputes based on Articles XXII and XXIII, with a view to improving and refining it, through their adoption of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance. Now, however, with two years of experience since the adoption of the Understanding, there are still grounds for concern about whether the dispute settlement procedures of the GATT are operating effectively. The Ministerial meeting provides an opportunity for the CONTRACTING PARTIES to reiterate their commitment to the effective operation of the system, to review its operation, and to take decisions on its improvement.

The dispute settlement procedures of the General Agreement and of the non-tariff measures agreements can contribute importantly to the preservation of the balance of rights and obligations within the GATT system. The integrity and credibility of the GATT as a basic framework governing the conduct of international trade depends on the effective operation of these procedures. This was explicitly recognized by contracting parties in the negotiation and adoption of the Understanding which was preceded by two other decisions designed to clarify certain aspects of the dispute settlement process: procedures under Article XXII on questions affecting the interests of a number of contracting parties, adopted in November 1958; and the Decision of April 1966 on procedures under Article XXIII, that dealt with disputes involving less-developed countries.

Since the completion of the Tokyo Round, contracting parties have resorted more frequently to dispute settlement procedures through panels created under Article XXIII and under the provisions of the non-tariff measure agreements. This is a positive development in that it reflects a commitment on the part of a number of contracting parties to resolve problems in a manner consistent with agreed rules of international trade.
This experience suggests, however, that certain facets of the procedures should be reviewed with the objective of ensuring the effective and efficient functioning of dispute settlement procedures. Issues to be addressed include:

(i) the timeliness of panel findings;
(ii) the composition of panels;
(iii) the rôle of panels;
(iv) the rôle of the secretariat;
(v) the adoption and implementation of panel reports including how to respond to bad reports.

Timeliness of panel findings

The Understanding states that a panel should be constituted as promptly as possible and "normally" not later than thirty days after the decision by the Council to establish it; in practice, this period is usually exceeded. The Annex to the Understanding indicates that panel proceedings have usually been completed within a reasonable period extending from three to nine months. Proceedings over the last two years, however, appear to have averaged ten to eleven months from the establishment of a panel to the presentation of its report. The Annex also notes there are no deadlines for the different phases of the actual procedure of the panel "because the matters submitted to panels differ as to their complexity and their urgency". The CONTRACTING PARTIES have, however, seen fit to establish deadlines for some panel procedures that would also be dealing with complex and urgent issues. Some deadlines are normative, for example, a panel "should" deliver its findings within sixty days (Subsidies and Countervailing Duties Code) or within four months (Codes on Government Procurement and Technical Barriers to Trade) from the date it was established; the deadline under the 1966 Decision, however, is absolute and requires that a panel "shall" report within sixty days.

It would be useful to assess recent experience with the time required for panel procedures and the reasons for delay where it has occurred; such reasons might, for example, include difficulties in the selection of panelists, or in agreeing on the terms of reference, or in the conduct of the proceedings themselves. Depending on the outcome of such an assessment the CONTRACTING PARTIES could consider measures designed to ensure that panel procedures are conducted as expeditiously as possible; consideration might be given to establishing deadlines for procedures under Article XXIII, even if only normative ones.
Composition of panels

Governments must have confidence in and respect for the ability and judgement of the panelists making findings and recommendations if they are to be guided by the results of the panel. It would seem appropriate to consider the use of senior trade policy officials from outside Geneva and non-governmental individuals knowledgeable about the GATT, to augment the pool of potential panelists in the delegations in Geneva. A number of contracting parties have in fact already nominated persons, not resident in Geneva, who would be available to serve on panels; a larger pool of qualified, prospective panelists therefore exists. The question that arises is why this resource is not being used as panelists continue to be drawn almost exclusively from Geneva based personnel with excessive reliance on a few missions.

This aspect of the dispute settlement mechanism might be examined with a view to making greater use of experienced personnel from outside Geneva missions. Two practical questions need to be addressed - one of finances and the problem of co-ordination of meetings that would arise with panelists from outside Geneva. The latter might in fact delay the process and affect the timeliness of panel reports.

An alternative approach would be to examine the possibility of establishing a group of full-time panelists attached to the secretariat. The group could be made up of perhaps nine people selected by the Director-General from a list of candidates nominated by contracting parties. Those selected might serve for two or three years with a certain number being replaced each year to ensure continuity. This proposal raises a number of questions and would have to be examined in detail but creation of a group of full-time, qualified panelists could facilitate the selection of panelists and ensure that reports are consistently well researched, authoritative, and produced in a much shorter time than panels now require. This proposal would not affect the respective roles of panels and the Council in the dispute settlement process, as laid out in the General Agreement, the various codes, and other pertinent understandings and decisions.

Role of panels

The basic objective of the dispute procedure is the effective resolution of a dispute in light of the GATT obligations of the contracting parties. The Understanding clearly states that the function of a panel "has normally been to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of these matters" and that "the first objective of the CONTRACTING PARTIES is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the General Agreement". This represents the adjudicative role of a panel but there is also a conciliatory one exemplified by the
practice of panels submitting the descriptive parts of reports to the parties concerned "to encourage development of mutually satisfactory solutions...". The panel process thus represents a mixture of adjudication and conciliation, but it appears that in some instances panels exercise an adjudicative role only if no alternative is available. This, in our view, is not consistent with established GATT practice. The CONTRACTING PARTIES have an obligation under Article XXIII to interpret the Agreement and to make findings or recommendations as appropriate. Panels are a technique used to fulfill this responsibility and their role includes making an objective assessment of the facts of the case in relation to the provisions of the GATT. A mutually satisfactory solution to a problem is encouraged throughout the dispute settlement process but too much emphasis on conciliation can undermine the credibility and effectiveness of the dispute settlement process.

It would be useful to review the trend in panel procedures and to examine whether panels should be encouraged to make specific recommendations on the action required to give effect to their findings.

Role of the secretariat

The secretariat already provides support services for panels including writing the initial drafts of panel reports. In addition, Item 6(iv) of the Annex to the Understanding stipulates panels may seek advice or assistance from the secretariat, especially on historical or procedural aspects, in its capacity as guardian of the General Agreement. There are indications that panels are either not seeking or not receiving the best possible advice in all cases from the secretariat. This increases the risk of bad panel findings.

Panels require expertise in interpreting the precedents and particular articles of the Agreement that are relevant to the dispute in question. A review of the role of the secretariat might determine whether it should be more active in ensuring consistency in GATT interpretations and in providing advice on precedents to guide panel deliberations. This might entail allocating additional resources within the secretariat to panel duties, and thought might be given to assigning responsibility for all panels to one legal advisory group under a Deputy Director-General. Developments such as these would help to forestall erroneous interpretations of GATT articles and precedents that can lead to difficulties in the disposition of the report by the Council.

Adoption and implementation of panel findings

The questions of adoption and implementation of (i.e. follow-up to) panel reports by the Council are perhaps the most difficult but the most important ones to be addressed in reviewing the dispute settlement mechanism. It involves, for instance, the question of how the Council should react to panel reports that are widely thought to contain
questionable or erroneous interpretations of the GATT and/or the facts of a case. The Council might choose simply to take note of the report rather than to adopt it formally but this raises the question of whether the CONTRACTING PARTIES would be fulfilling their responsibility as the ultimate authority for the resolution of disputes. Consideration might be given to providing a more active role for the Council in such circumstances.

The issues of adoption and follow-up remain even if the quality of the panel report is not questioned. Despite provision in the Understanding that the CONTRACTING PARTIES "shall keep under surveillance any matter on which they have made recommendations or given rulings", the Council appears to have abandoned its former practice of adopting specific resolutions, recommendations or decisions, based on panel findings, that exhorted a contracting party to bring its policies or practices into line with its obligations under the GATT and to report to the Council on its progress in doing so; there have been instances of the Council returning to specific issues for several consecutive sessions noting that a contracting party had not yet effected the requisite change in policies and urging it to do so. The change in Council practice, which may be represented as a move away from the collective responsibility of the CONTRACTING PARTIES for the resolution of disputes, may reflect a similar evolution in the operation of panels. Whereas panels previously seemed to make specific recommendations on the basis of their findings, they now sometimes only analyse the facts of a case in the light of GATT obligations but do not then recommend specific action to be taken by the contracting parties involved. This reflects the tension between the adjudicative and conciliative roles of a panel noted above and the fact that panels formulate draft recommendations to the parties "if so requested by the CONTRACTING PARTIES". This should perhaps become a standard feature of the terms of reference of panels.

It would be useful to review the evolution of panel findings and Council reactions to determine if these impressions are correct and, if so, to consider their implications for the effectiveness of the dispute settlement process.

Conclusion

Effective dispute settlement procedures are essential to the credibility of the General Agreement as a framework for the management of international trade relations and disputes. Contracting parties appear to be resorting more frequently to the dispute settlement process and, despite the value of the Understanding adopted in 1979, experience suggests there is a need for further changes if the process is to be effective. A detailed review could identify more clearly the weaknesses in the current system that might then be dealt with through further understandings among the contracting parties. It must be recognized, however, that while the
effective operation of the dispute settlement process may be facilitated by procedural changes, it can only be guaranteed by a renewed political commitment to make the process function effectively and expeditiously, and to implement panel findings and recommendations adopted by the CONTRACTING PARTIES. The Ministerial meeting provides an opportunity to make that renewal of political commitment and to improve the procedural aspects of the system.